



1 ENERGY AND ENVIRONMENT CABINET

2 Office of the Secretary

3 (Amendment)

4 400 KAR 1:110. Administrative hearings relating to matters brought under KRS Chapter 350 or
5 KRS 351.310 through 351.375.

6 RELATES TO: KRS 224.10-410, 350.010, 350.028, 350.0301, 350.070, 350.090, 350.093,
7 350.130, 350.255, 350.465, 350.990, 351.315, 351.345, 351.350, 30 C.F.R. Parts 730, 731, 732,
8 733, 735, 917, 30 U.S.C. 1253, 1255

9 STATUTORY AUTHORITY: KRS 350.020, 350.028, 350.0301, 350.255, 350.465,
10 350.610, 351.315, 351.345, 351.350, 30 C.F.R. Parts 730, 731, 732, 733, 735, 917, 30 U.S.C. 1253,
11 1255

12 NECESSITY, FUNCTION, AND CONFORMITY: KRS Chapter 350 requires the cabinet
13 to promulgate rules and administrative regulations pertaining to surface coal mining and
14 reclamation operations and coal exploration operations. KRS Chapter 351 authorizes the cabinet
15 to promulgate rules and administrative regulations pertaining to explosives and blasting
16 operations. This administrative regulation establishes hearing, conference, notice, penalty
17 assessment, and other procedural and due process provisions for the permanent regulatory program
18 under KRS Chapter 350, and the hearing procedures pursuant to KRS Chapter 351.

19 Section 1. Definitions. (1) "Applicant" is defined by 405 KAR 7:001.

20 (2) "Application" is defined by 405 KAR 7:001.

21 (3) "Cessation order" is defined by 405 KAR 7:001.

(4) "Coal" is defined by 405 KAR 7:001.

(5) "Coal exploration" is defined by 405 KAR 7:001.

(6) "Department" is defined by KRS 351.310.

(7) "Knowingly" is defined by 405 KAR 7:001.

(8) "Notice of noncompliance and order for remedial measures" is defined by 405 KAR 7:001.

(9) "Operations" is defined by KRS 350.010(6).

(10) "Operator" is defined by KRS 350.010(8).

(11) "Permit" is defined by 405 KAR 7:001.

(12) "Permit area" is defined by 405 KAR 7:001.

(13) "Permittee" is defined by KRS 350.010(21).

(14) "Reclamation" is defined by KRS 350.010(12).

(15) "Secretary" is defined by KRS 350.010(11).

(16) "Significant, imminent environmental harm" is defined by 405 KAR 7:001.

(17) "Surface coal mining and reclamation operations" is defined by KRS 350.010(1).

(18) "Transfer, assignment, or sale of permit rights" is defined by 405 KAR 7:001.

(19) "Willfully" and "willful violation" is defined by 405 KAR 7:001.

Section 2. Applicability. This administrative regulation shall govern the conduct by the cabinet of all administrative hearings: (1) And conferences arising under KRS Chapter 350 relating to surface coal mining and reclamation operations and coal exploration operations, including those matters initiated by a petition for hearing filed on or before August 4, 2017; and

(2) Authorized by KRS Chapter 351 relating to explosives and blasting operations.

Section 3. Proposed Penalty Assessment and Request for Assessment Conference and Administrative Hearing.

(1) Notification. The cabinet shall notify a person issued a notice of noncompliance and order for remedial measures or a cessation order in writing of the cabinet's proposed penalty assessment. The proposed penalty assessment shall be made by authorized personnel of the department.

(2) Criteria. The department, in determining the amount of the proposed penalty assessment, shall give consideration to:

(a) History of previous violations of the permittee or operator at the particular surface coal mining and reclamation operation;

(b) The seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public;

(c) Whether or not the permittee, operator, or person was negligent; and

(d) The demonstrated good faith of the permittee, operator, or person in attempting to achieve rapid compliance after notification of the violation, except that good faith consideration shall not be applicable to any violation determined not to be correctable.

(3) Service method; time.

(a) The department shall serve the notice of proposed penalty assessment along with copies of applicable worksheets, to the person to whom the notice or order was issued within fifteen (15) working days after issuance of the final notice of inspection of noncompliance or final notice of inspection of cessation order.

(b) The department shall serve the notice of proposed penalty assessment by utilizing one (1) of the following:

1 1. A service method established in 400 KAR 1:090, Section 5(3) and (4); or

2 2. Electronic mail pursuant to KRS 350.130.

3 (c) Service shall be deemed effective pursuant to 400 KAR 1:090, Section 5(5) or upon
4 delivery of the notice of proposed penalty assessment with copies of worksheets to the recipient's
5 inbox by electronic mail as electronically communicated to the department by an electronic
6 registered receipt.

7 (d) Failure to serve the proposed penalty assessment within fifteen (15) working days after
8 issuance of the final notice of inspection of noncompliance or final notice of inspection of cessation
9 order shall not be grounds for dismissal of all or part of the assessment unless:

10 1. The person against whom the proposed penalty has been assessed proves actual and
11 substantial prejudice as a result of the delay; and

12 2. The person makes a timely written objection to the delay on or before the last date to
13 request an assessment conference under subsection (4)(b) of this section.

14 (4) Options of person issued notice of proposed penalty assessment.

15 (a) Waiver of rights to challenge proposed penalty assessment if no petition was filed
16 challenging the fact of the violation.

17 1. The person shall notify the department that the person elects not to contest the proposed
18 penalty assessment.

19 2. If the person did not file a timely petition requesting an administrative hearing as to the
20 fact of the violation pursuant to Section 7 of this administrative regulation, then the secretary shall
21 issue a final order finding that:

1 a. The person to whom the notice of noncompliance and order for remedial measures or
2 cessation order was issued has waived all rights to an administrative hearing on the amount of the
3 proposed assessment;

4 b. The fact of the violation is deemed admitted; and

5 c. The proposed penalty is due and payable within thirty (30) days after the entry of the
6 final order.

7 (b) Waiver of rights to challenge penalty assessment and the person filed a petition
8 challenging the fact of the violation.

9 1. The person shall notify the department that the person elects not to contest the proposed
10 penalty assessment.

11 2. If the person filed a timely petition requesting an administrative hearing as to the fact of
12 the violation pursuant to Section 7 of this administrative regulation, then the secretary shall issue
13 a final order finding that:

14 a. The person to whom the notice of noncompliance and order for remedial measures or
15 cessation order was issued has waived all rights to an administrative hearing on the amount of the
16 proposed assessment; and

17 b. The proposed penalty is due and payable within thirty (30) days of the mailing of a final
18 order affirming the fact of the violation.

19 (c) Request for an assessment conference. The person shall request in writing an
20 assessment conference within thirty (30) days:

21 1. Of receipt of the notice of proposed penalty assessment; or

22 2. From the date the notice of proposed penalty assessment is returned to the department
23 as undeliverable, unclaimed or refused.

1 (d) Petition for administrative hearing.

2 1. The person shall contest the proposed penalty assessment or the fact of the violation by
3 submitting a petition for an administrative hearing in accordance with Section 6 or 7 of this
4 administrative regulation, or contest both by filing a petition for an administrative hearing in
5 accordance with Sections 6 and 7.

6 2. The fact of the violation shall not be contested if it has been adjudicated by a final order
7 of the secretary pursuant to an administrative hearing commenced under Section 7 of this
8 administrative regulation.

9 (5) Failure to Request a Penalty Assessment Conference. If a person issued a proposed
10 penalty assessment fails to request in writing an assessment conference in a timely manner as set
11 forth in subsection (4)(c) of this section or has not filed a timely petition in accordance with Section
12 6 of this administrative regulation, then the cabinet shall consider the failure to request an
13 assessment conference a waiver of the person's right to a conference. The secretary shall enter a
14 final order pursuant to paragraph (a) or (b) of this subsection.

15 (a) If the person did not file a timely petition requesting an administrative hearing as to the
16 fact of the violation pursuant to Section 7 of this administrative regulation, then the secretary shall
17 issue a final order finding that:

18 1. The person to whom the notice of noncompliance and order for remedial measures or
19 cessation order was issued has waived all rights to an administrative hearing on the amount of the
20 proposed assessment;

21 2. The fact of the violation shall be deemed admitted; and

22 3. The proposed penalty shall be due and payable within thirty (30) days after the entry of
23 the final order.

(b) If the person filed a timely petition requesting an administrative hearing as to the fact of the violation pursuant to Section 7 of this administrative regulation, then the secretary shall issue a final order finding that:

1. The person to whom the notice of noncompliance and order for remedial measures or cessation order was issued has waived all rights to an administrative hearing on the amount of the proposed assessment; and

2. The proposed penalty shall be due and payable within thirty (30) days of the mailing of a final order affirming the fact of the violation.

Section 4. Procedures for Assessment Conference. (1) Date and location of conference; failure to timely schedule; substantial prejudice.

(a) If an assessment conference is requested, the cabinet shall schedule the assessment conference within sixty (60) days after the cabinet's receipt of the request, unless all parties agree otherwise.

(b) An assessment conference shall be held in the department's regional office of the mine site subject to the proposed penalty assessment unless the parties agree otherwise.

1. If all the parties or their counsel request to participate by telephone or other electronic means, then the conference officer may hold the assessment conference telephonically or by any other electronic means agreed to by the parties.

2. Any person who attends the assessment conference in person at the department's regional office shall have access to the telephonic conference line or the electronic means utilized during the assessment conference.

(c) Failure by the cabinet to timely schedule an assessment conference shall not be grounds for dismissal of all or part of an assessment unless the person against whom the proposed penalty

has been assessed makes a timely objection on or before the date of the assessment conference and proves actual and substantial prejudice as a result of the delay.

(d) The scheduling of the assessment conference shall not operate as a stay of any notice of noncompliance and order for remedial measures or cessation order.

(2) Service; public participation.

(a) The cabinet shall serve notice of the assessment conference by mail, postage prepaid [~~pursuant to 400 KAR 1:090, Section 5~~].

(b) The cabinet shall also send a copy of the notice of the assessment conference to any person who filed a report that led to the issuance of the notice of noncompliance and order for remedial measures or cessation order being contested.

(c) The cabinet shall post notice of the assessment conference at the department's regional office of the mine site subject to the proposed penalty assessment at least five (5) days before the assessment conference.

(d) Any person shall have the right to attend and participate in the assessment conference.

(3) Conference officer; requirements for administrative hearings not applicable. The office shall assign a conference officer to hold the assessment conference. The assessment conference shall not be governed by the requirements for administrative hearings in 401 KAR 1:090 or by the provisions of 400 KAR 1:040.

(4) Report of conference officer. The conference officer shall consider all relevant information pertaining to the proposed penalty assessment. Within thirty (30) days after the assessment conference is held, the conference officer shall issue a report recommending to the secretary to either affirm, raise, lower, or dismiss the proposed penalty assessment.

1 (5) Service of report; documentation. The conference officer's report shall be served by
2 mail, postage prepaid, and shall include a worksheet if the penalty has been raised or lowered. The
3 reasons underlying the conference officer's report shall be fully documented.

4 (6) Failure to attend; report to issue. If the person requesting an assessment conference fails
5 to attend the scheduled assessment conference, the assessment officer shall within thirty (30) days
6 of the date of the scheduled assessment conference issue a report to the secretary recommending
7 that the proposed penalty assessment be affirmed.

8 (7) Statements not to be introduced at an administrative hearing. In any administrative
9 hearing commenced under Section 6 or 7 of this administrative regulation, evidence as to
10 statements made by a party at an assessment conference shall not be introduced by another party
11 as evidence or to impeach a witness.

12 (8) Challenge to conference officer's report.

13 (a) Any person issued a proposed penalty assessment may file a petition requesting an
14 administrative hearing to contest the conference officer's recommended penalty. A petition shall
15 comply with Section 6 of this administrative regulation.

16 (b) The cabinet may file a petition to request under Section 5 of this administrative
17 regulation an administrative hearing to contest the conference officer's recommended penalty.

18 (9) Failure to timely file a petition challenging the conference report. If a person issued a
19 proposed penalty assessment fails to timely file a petition in accordance with Section 6 of this
20 administrative regulation challenging the conference report, the secretary shall issue a final order
21 pursuant to paragraph (a) or (b) of this subsection.

1 (a) If the person also did not file a timely petition requesting an administrative hearing as
2 to the fact of the violation pursuant to Section 7 of the administrative regulation, then the secretary
3 shall issue a final order finding that:

4 1. The person to whom the notice of noncompliance and order for remedial measures or
5 cessation order was issued has waived all rights to an administrative hearing on the amount of the
6 proposed assessment;

7 2. The fact of the violation shall be deemed admitted; and

8 3. The proposed penalty shall be due and payable within thirty (30) days after the entry of
9 the final order.

10 (b) If the person filed a timely petition requesting an administrative hearing as to the fact
11 of the violation pursuant to Section 7 of the administrative regulation, then the secretary shall issue
12 a final order finding that:

13 1. The person to whom the notice of noncompliance and order for remedial measures or
14 cessation order was issued has waived all rights to an administrative hearing on the amount of the
15 proposed assessment; and

16 2. The proposed penalty shall be due and payable within thirty (30) days of the mailing of
17 a final order affirming the fact of the violation.

18 Section 5. Administrative Hearing Initiated by the Cabinet. (1) Criteria for filing.

19 (a) The cabinet may initiate an administrative hearing if:

20 1. The cabinet has reason to believe that a violation of KRS Chapter 350 or 405 KAR
21 Chapters 7 through 24 has occurred or is occurring;

22 2. A violation of a permit condition has occurred or is occurring;

23 3. A permittee, operator, or person has failed to:

1 a. Pay a civil penalty assessed by the cabinet;
2 b. Undertake remedial measures mandated by an order of the cabinet; or
3 c. Abate violations the permittee, operator, or person was determined to have committed
4 by an order of the cabinet;

5 4. The provisions of KRS 350.990(9) apply;
6 5. The cabinet has reason to believe additional remedies should be sought or an order
7 should be entered against a person to protect the environment or the health and safety of the public;
8 6. The criteria of 405 KAR 10:050, Section 3(2) or (3) apply;
9 7. The cabinet has determined that revocation of a license under KRS 351.345 is warranted;
10 or
11 8. An explosive user or seller notified the cabinet pursuant to KRS 351.350 that they intend
12 to challenge a citation issued under KRS 351.315 to 351.375.

13 (b) The cabinet may initiate an administrative hearing to contest a conference officer's
14 recommended penalty and seek any combination of the relief set forth in subsection (2) of this
15 section.

16 (c) The cabinet shall initiate an administrative hearing and shall seek revocation of the
17 permit and forfeiture of the bond or suspension of the permit pursuant to KRS Chapter 350 if:

18 1. The permittee, operator, or person has willfully failed to comply with a cessation order;
19 or
20 2. The criteria of 405 KAR 10:050, Section 3(1) apply.

21 (2) Remedies.

1 (a) In an administrative hearing pursuant to KRS Chapter 350 initiated by the cabinet or in
2 a counter claim filed in response to a petition filed in accordance with Section 6, 7, 8, or 9, the
3 cabinet may seek one (1) or a combination of the following:

4 1. Permit suspension or revocation;

5 2. Bond forfeiture;

6 3. Civil penalty;

7 4. A determination, pursuant to KRS 350.060, 350.085, and 350.130, that a person shall
8 not be eligible to receive another permit or conduct future operations;

9 5. A determination, pursuant to KRS 350.990(9), that any director, officer, or agent of a
10 corporation willfully and knowingly authorized, ordered, or carried out a violation or failed or
11 refused to comply with any final order; or

12 6. Any other relief to which the cabinet may be entitled by KRS Chapter 350.

13 (b) In an administrative hearing pursuant to KRS Chapter 351 initiated by the cabinet, the
14 cabinet may seek one (1) or a combination of the following:

15 1. Revocation of license or permit pursuant to KRS 351.345 or KRS 351.315;

16 2. Civil penalty pursuant to KRS 351.350; or

17 3. Any other relief to which the cabinet may be entitled by KRS 351.315 to 351.375.

18 (3) Procedure for an administrative hearing initiated by the cabinet.

19 (a) Filing of administrative complaint. The cabinet shall initiate an administrative hearing
20 by filing an administrative complaint with the office incorporating the following for each claim
21 for relief:

22 1. A statement of facts entitling the cabinet to administrative relief;

23 2. A request for specific relief;

1 3. A copy of any notice, order, citation, or determination upon which relief is sought; and

2 4. In a bond forfeiture action, the cabinet shall attach documentation to the petition that the
3 cabinet contacted the bonding company or financial institution providing the bond, to determine if
4 it wanted the right to perform the measures necessary to secure bond release in accordance with
5 KRS 350.130.

6 (b) Answer or responsive pleading.

7 1. The respondent shall file with the office an answer or responsive pleading within thirty
8 (30) days of service of the administrative complaint.

9 2. The answer shall contain:

10 a.(i) A statement specifically admitting or denying the alleged facts stated in the
11 administrative complaint or amended administrative complaint; or

12 (ii) If the person is without knowledge or information sufficient to form a belief as to the
13 truth of an allegation, then the person shall so state and it shall have the effect of a denial;

14 b. Any defense to each claim for relief; and

15 c. Any other matter to be considered on review.

16 3. Failure to plead any available administrative affirmative defense in a required answer or
17 responsive pleading may constitute a waiver of the defense, except that lack of jurisdiction over
18 the subject matter and failure to state a claim upon which relief can be granted shall not be waived
19 by failure to assert them in a responsive pleading.

20 4. An allegation in a pleading to which an answer or responsive pleading is not required or
21 permitted shall be taken as denied or avoided.

22 5. An allegation in a pleading to which an answer or responsive pleading is required may
23 be deemed admitted if not denied in the answer or responsive pleading.

1 (c) Amendment.

2 1. An administrative complaint may be amended once as a matter of right prior to the filing
3 of an answer and thereafter by leave of the hearing officer upon proper motion.

4 2. The respondent shall have ten (10) days from the filing of an amended administrative
5 complaint or the time remaining for filing an answer to the original complaint, whichever is longer,
6 to file an answer or responsive pleading to the amended administrative complaint.

7 3. If the hearing officer grants a motion to amend the administrative complaint, the hearing
8 officer shall set the time for an answer to be filed in the order granting the motion.

9 (4) Burden of proof.

10 (a) The cabinet shall have the ultimate burden of persuasion.

11 (b) A respondent shall have the burden of persuasion to establish an affirmative defense.

12 (c) A respondent claiming an exemption shall have the burden of persuasion to establish
13 the qualification for the exemption.

14 (5) Default.

15 (a) If the person against whom the administrative complaint is filed fails to timely comply
16 with a prehearing order of a hearing officer, the hearing officer may on his or her own initiative or
17 upon motion, issue an order to show cause why the person should not be deemed to have waived
18 the right to an administrative hearing and why a report and recommended order adverse to the
19 person shall not be referred to the secretary.

20 (b) If the order to show cause is not satisfied as required, the hearing officer shall
21 recommend to the secretary the entry of a final order in conformity with the relief requested by the
22 cabinet in its administrative complaint.

1 (c) If the person against whom the administrative complaint is filed fails to appear at an
2 administrative hearing, the person shall be deemed to have waived the right to a hearing and the
3 hearing officer shall recommend to the secretary the entry of a final order in conformity with the
4 relief requested by the cabinet in its administrative complaint.

5 Section 6. Administrative Hearing for Review of Proposed Assessment.

6 (1) Who may file. Any person issued a proposed penalty assessment may file with the
7 office a petition for an administrative hearing to review the penalty.

8 (2) Filing petition; waiver.

9 (a) A person filing a petition for review of a proposed penalty assessment who did not make
10 a request for a Penalty Assessment Conference pursuant to Section 4 of this administrative
11 regulation shall file the petition in the office within thirty (30) days of:

12 1. Receipt of the proposed penalty assessment; or

13 2. The return receipt date in the department of the notice of proposed penalty assessment,
14 if the proposed penalty assessment is returned undeliverable, unclaimed, or refused.

15 (b) If the person made a timely request for an assessment conference pursuant to Section 4
16 of this administrative regulation, the person shall file a petition for review in the office within
17 thirty (30) days of:

18 1. Receipt of the conference officer's report; or

19 2. The return receipt date in the office of the conference officer's report, if the conference
20 officer's report is returned undeliverable, unclaimed, or refused;

21 (c) The hearing officer shall not grant an extension of time for filing a petition for review
22 of a proposed penalty assessment.

1 (d) If the hearing officer, upon motion or his or her own initiative, finds that the person
2 failed to timely file the petition for review in accordance with this section, the hearing officer shall
3 issue a report recommending dismissal of the petition. The secretary shall enter an order in
4 accordance with Section 4(9)(a) or (b) of this administrative regulation.

5 (3) Content of the petition. The petition shall include:

6 (a) A short and plain statement indicating the reasons why the amount of the penalty is
7 being contested;

8 (b) If the amount of penalty is being contested based upon a misapplication of the penalty
9 formula, a statement indicating how the penalty formula contained in 405 KAR 7:095 was
10 misapplied, along with a proposed penalty utilizing the penalty formula; and

11 (c) Identification by reference to the number for the notice of noncompliance and order for
12 remedial measures or cessation order number.

13 (4) Answer or responsive pleading.

14 (a) The respondent shall file with the office an answer or responsive pleading within thirty
15 (30) days of service of the petition.

16 (b) The answer shall contain:

17 1.a. A statement specifically admitting or denying the facts stated in the petition or
18 amended petition; or

19 b. If the person is without knowledge or information sufficient to form a belief as to the
20 truth of an allegation, then the person shall so state and it shall have the effect of a denial;

21 2. Any defense to each claim for relief; and

22 3. Any other matter to be considered on review.

1 (c) Failure to plead any available administrative affirmative defense in a required answer
2 or responsive pleading may constitute a waiver of that defense, except that lack of jurisdiction over
3 the subject matter and failure to state a claim upon which relief can be granted shall not be waived
4 by failure to assert them in an answer or responsive pleading.

5 (d) An allegation in the petition to which no answer or responsive pleading is required or
6 permitted shall be taken as denied or avoided.

7 (e) An allegation in the petition to which an answer or responsive pleading is required may
8 be deemed admitted if not denied in the answer or responsive pleading.

9 (5) Amended petition.

10 (a) A petition may be amended once as a matter of right prior to the filing of an answer and
11 thereafter by leave of the hearing officer upon proper motion.

12 (b) The respondent shall have ten (10) days from the filing of an amended petition or the
13 time remaining for filing an answer to the original petition, whichever is longer, to file an answer
14 or responsive pleading to the amended petition.

15 (c) If the hearing officer grants a motion to amend a petition, the hearing officer shall set
16 the time for an answer to be filed, which shall be set forth in the order granting the motion.

17 (6) Burden of proof. The cabinet shall have the burden of going forward to establish a
18 prima facie case as to the amount of the penalty assessment and the ultimate burden of persuasion
19 as to the amount of the penalty assessment.

20 (7) Default.

21 (a) If the petitioner fails to timely comply with a prehearing order of a hearing officer, the
22 hearing officer, may at his or her discretion or upon motion, issue an order to show cause why the

1 person should not be deemed to have waived the right to an administrative hearing and why the
2 petition should not be dismissed.

3 (b) If the order to show cause is not satisfied as required, the hearing officer shall
4 recommend to the secretary the entry of a final order in conformity with Section 4(9)(a) or (b) of
5 this administrative regulation.

6 (c) If the person against whom the proposed penalty is assessed fails to appear at an
7 administrative hearing, the person shall be deemed to have waived the right to a hearing and the
8 hearing officer shall recommend to the secretary the entry of a final order in conformity with
9 Section 4(9)(a) or (b) of this administrative regulation.

10 (8) Hearing officer report; contents. If an administrative hearing is conducted, the hearing
11 officer shall incorporate in the report and recommended order concerning a civil penalty, findings
12 of fact on each of the four (4) criteria set forth in 405 KAR 7:095, Section 3 and conclusions of
13 law.

14 Section 7. Administrative Review of a Notice of Noncompliance and Order for Remedial
15 Measures and a Cessation Order.

16 (1) Who may file. A person who considers himself aggrieved by the issuance of a notice
17 of noncompliance and order for remedial measures or cessation order by the cabinet pursuant to
18 the provisions of KRS Chapter 350 or administrative regulations may file a petition for review
19 with the office.

20 (2) Time for filing.

21 (a) A person filing a petition for review under this section shall file in the office a petition
22 within:

1 1. Thirty (30) days of the receipt of a notice of noncompliance and order for remedial
2 measures or cessation order;

3 2. Thirty (30) days of receipt of notice of modification, vacation, or termination of the
4 notice of noncompliance and order for remedial measures or cessation order; or

5 3. Thirty (30) days of the return receipt date in the department of the notice of
6 noncompliance and order for remedial measures or cessation order if the notice of noncompliance
7 and order for remedial measures or cessation order is returned as undeliverable, unclaimed, or
8 refused.

9 4. Thirty (30) days of:

10 a. Receipt of the proposed penalty assessment; or

11 b. The return receipt date in the department of the notice of proposed penalty assessment,
12 if the proposed penalty assessment is returned undeliverable, unclaimed, or refused.

13 5. Thirty (30) days of:

14 a. Receipt of the penalty assessment conference officer's report; or

15 b. The return receipt date in the office of the penalty assessment conference officer's report,
16 if the conference officer's report is returned undeliverable, unclaimed, or refused.

17 (b) The hearing officer shall not grant an extension of time for filing a petition for review.

18 (c) If the hearing officer, upon motion or his or her own initiative, finds that the person
19 failed to timely file the petition for review in accordance with this section, the hearing officer shall
20 issue a report recommending dismissal of the petition. The secretary shall dismiss a petition that
21 is not filed in accordance with subsection (2)(a) of this section finding that the person waived the
22 right to an administrative hearing and affirming the notice of noncompliance and order for remedial
23 measures or cessation order.

1 (3) Content of the petition. A person filing a petition for review shall incorporate in the
2 petition regarding each claim for relief:

3 (a) A statement of facts entitling that person to administrative relief;

4 (b) A request for specific relief;

5 (c) An explanation of each specific alleged error in the cabinet's determination;

6 (d) A copy of the notice of noncompliance and order for remedial measures or cessation
7 order sought to be reviewed; and

8 (e) A statement as to whether or not the person waives the opportunity for an evidentiary
9 hearing;

10 (4) Answer or responsive pleading.

11 (a) The respondent shall file with the office an answer or responsive pleading within thirty
12 (30) days of service of the petition.

13 (b) The answer shall contain:

14 1.a. A statement specifically admitting or denying the facts stated in the petition or
15 amended petition; or

16 b. If the person is without knowledge or information sufficient to form a belief as to the
17 truth of an allegation, then the person shall so state and it shall have the effect of a denial;

18 2. Any defense to each claim for relief; and

19 3. Any other matter to be considered on review.

20 (c) Failure to plead any available administrative affirmative defense in a required answer
21 or responsive pleading may constitute a waiver of the defense, except that lack of jurisdiction over
22 the subject matter and failure to state a claim upon which relief can be granted shall not be waived
23 by failure to assert those defenses in an answer or responsive pleading.

1 (d) An allegation in the petition to which no answer or responsive pleading is required or
2 permitted shall be taken as denied or avoided.

3 (e) An allegation in the petition to which an answer or responsive pleading is required may
4 be deemed admitted if not denied in the answer or responsive pleading.

5 (5) Amended petition.

6 (a) A petition may be amended once as a matter of right prior to the filing of an answer and
7 thereafter by leave of the hearing officer upon proper motion.

8 (b) The respondent shall have ten (10) days from the filing of a petition amended as a matter
9 of right or the time remaining for filing an answer to the original petition, whichever is longer, to
10 file an answer or responsive pleading to the amended petition.

11 (c) If the hearing officer grants a motion to amend a petition, the time for an answer to be
12 filed shall be set forth in the order granting the motion.

13 (6) Requirement to file subsequent notice of noncompliance and order for remedial
14 measures or cessation order.

15 (a) Within ten (10) days of receipt, a petitioner shall file a copy of any subsequent notice
16 of noncompliance and order for remedial measures or cessation order that modifies, vacates, or
17 terminates the notice of noncompliance and order for remedial measures or cessation order sought
18 to be reviewed.

19 (b) Within ten (10) days of receipt, a petitioner shall file a copy of any subsequent cessation
20 order for failure to timely abate the violation that is the subject to the notice sought to be reviewed.

21 (c) If a petitioner desires to challenge a subsequent notice of noncompliance and order for
22 remedial measures or cessation order, the petitioner shall file:

23 1. A separate petition for review in accordance with this section; or

1 2. A motion to amend a pending petition with the amended petition attached in accordance
2 with this section and within the time requirements of subsection (2) of this section.

3 (d) A petition for review of a related notice of noncompliance and order for remedial
4 measures or cessation order shall be subject to consolidation.

5 (7) Default.

6 (a) If the petitioner fails to timely comply with a prehearing order of a hearing officer, the
7 hearing officer may, at his or her discretion or upon motion, issue an order to show cause why the
8 petitioner should not be deemed to have waived the right to an administrative hearing and why the
9 petition should not be dismissed.

10 (b) If the order to show cause is not satisfied as required, the hearing officer shall
11 recommend to the secretary the entry of a final order affirming the notice of noncompliance and
12 order for remedial measures or cessation order and dismissing the petition.

13 (c) If the petitioner fails to appear at an administrative hearing, the person shall be deemed
14 to have waived the right to an administrative hearing and the hearing officer shall recommend to
15 the secretary the entry of a final order affirming the notice of noncompliance and order for remedial
16 measures or cessation order and dismissing the petition.

17 (8) Burden of proof. In review of a notice of noncompliance and order for remedial
18 measures or cessation order or the modification, vacation, or termination thereof under this section,
19 the cabinet shall have the burden of going forward to establish a prima facie case as to the propriety
20 of the notice of noncompliance and order for remedial measures or cessation order, or
21 modification, vacation, or termination thereof. The ultimate burden of persuasion shall rest with
22 the petitioner.

1 Section 8. Request for Review of Permit Determinations Pursuant to KRS Chapter 350. (1)

2 Who may file. The permit applicant, permittee, or person having an interest that is or may be
3 adversely affected by a permit determination of the cabinet may file a petition for review of the
4 following:

5 (a) Application for a new permit;

6 (b) Application for a permit revision and amendment, permit renewal, and the transfer,
7 assignment, or sale of rights granted under permit;

8 (c) Permit revision and amendment ordered by the cabinet, except challenges of permit
9 revision ordered as a remedial measure in a notice of noncompliance shall be reviewed in an
10 administrative hearing pursuant to Section 7 of this administrative regulation; and

11 (d) Application for a coal exploration permit.

12 (2) Time to file; waiver.

13 (a) The permit applicant, permittee, or person having an interest that is or may be adversely
14 affected by a permit determination of the cabinet shall file a petition for review with the office
15 within thirty (30) days from the date the permit applicant, permittee, or person had actual notice
16 of the determination or could reasonably have had notice.

17 (b) If the hearing officer, upon motion or his or her own initiative, finds that the permit
18 applicant, permittee, or person failed to timely file the petition for review in accordance with this
19 section, the hearing officer shall issue a report recommending dismissal of the petition. The
20 secretary shall enter an order stating that the permit applicant, permittee, or person waived the right
21 to an administrative hearing.

22 (3) Content of the petition. The petition for review shall include:

1 (a) A clear statement of the facts entitling the person requesting review to administrative
2 relief;

3 (b) An explanation of each specific alleged error in the cabinet's decision, including
4 reference to the statutory and regulatory provisions allegedly violated;

5 (c) A request for specific relief; and

6 (d) A statement whether or not the person requests or waives the opportunity for an
7 evidentiary hearing.

8 (4) Answer or responsive pleading.

9 (a) The respondent shall file with the office an answer or responsive pleading within thirty
10 (30) days of service of the petition.

11 (b) The answer shall contain:

12 1.a. A statement specifically admitting or denying the facts stated in the petition or
13 amended petition; or

14 b. If the person is without knowledge or information sufficient to form a belief as to the
15 truth of an allegation, then the person shall so state and it shall have the effect of a denial;

16 2. Any defense to each claim for relief; and

17 3. Any other matter to be considered on review.

18 (c) Failure to plead any available administrative affirmative defense in a required answer
19 or responsive pleading may constitute a waiver of that defense, except that lack of jurisdiction over
20 the subject matter and failure to state a claim upon which relief can be granted shall not be waived
21 by failure to assert them in an answer or a responsive pleading.

22 (d) An allegation in the petition to which no answer or responsive pleading is required or
23 permitted shall be taken as denied or avoided.

1 (e) An allegation in the petition to which an answer or responsive pleading is required may
2 be deemed admitted if not denied in the answer or responsive pleading.

3 (5) Amended petition.

4 (a) A petition may be amended once as a matter of right prior to the filing of an answer and
5 thereafter by leave of the hearing officer upon proper motion.

6 (b) The respondent shall have ten (10) days from the filing of an amended petition or the
7 time remaining for filing an answer to the original petition, whichever is longer, to file an answer
8 or responsive pleading to the amended petition.

9 (c) If the hearing officer grants a motion to amend a petition, the hearing officer shall set
10 the time for an answer to be filed in the order granting the motion.

11 (6) Effect of filing. The filing of a petition for review shall not stay the effectiveness of the
12 cabinet's determination pending completion of administrative review.

13 (7) Default.

14 (a) If the petitioner fails to timely comply with a prehearing order of a hearing officer, the
15 hearing officer may, at his or her discretion or upon motion, issue an order to show cause why the
16 person should not be deemed to have waived the right to an administrative hearing and why the
17 petition should not be dismissed.

18 (b) If the order to show cause is not satisfied as required, the hearing officer shall
19 recommend to the secretary the entry of a final order finding that the petitioner has waived the
20 right to an administrative hearing and dismissing the petition.

21 (c) If the person requesting the administrative hearing fails to appear at a hearing, the
22 hearing officer shall recommend to the secretary the entry of a final order finding that the petitioner
23 has waived the right to an administrative hearing and dismissing the petition.

1 (8) Burden of proof.

2 (a) Petition to review application for a new permit.

3 1. If the permit applicant is seeking review, he or she shall have the burden of going forward
4 to establish a prima facie case and the ultimate burden of persuasion that:

5 a. The permit application complies with the requirements of KRS Chapter 350 and
6 administrative regulations; or

7 b. The permit terms or conditions are improper.

8 2. If a person other than the permit applicant is seeking review, the person shall have the
9 burden of going forward to establish a prima facie case and the ultimate burden of persuasion that:

10 a. The permit application fails to comply with the requirements of KRS Chapter 350 or the
11 administrative regulations; or

12 b. The cabinet should have imposed certain terms or conditions on the permit that were not
13 imposed.

14 (b) Petition to review the approval or disapproval of an application for a permit renewal.

15 1. A party opposing the renewal of a permit shall have the burden of going forward to
16 establish a prima facie case; and

17 2. The ultimate burden of persuasion that the permit renewal application should be
18 disapproved or that the cabinet should have imposed certain terms or conditions on the renewal
19 permit that were not imposed.

20 (c) Petition to review the approval or disapproval of an application for a permit revision or
21 amendment, or an application for the transfer, assignment, or sale of rights granted under permit.

1 1. If the permit applicant is seeking review, the permit applicant shall have the burden of
2 going forward to establish a prima facie case and the ultimate burden of persuasion that the permit
3 application complies with the requirements of KRS Chapter 350 and administrative regulations.

4 2. If a person other than the permit applicant is seeking review, the person shall have the
5 burden of going forward to establish a prima facie case and the ultimate burden of persuasion that
6 the application fails to comply with the requirements of KRS Chapter 350 or the administrative
7 regulations.

8 (d) Petition to review a permit revision or amendment ordered by the cabinet.

9 1. The cabinet shall have the burden of going forward to establish a prima facie case that
10 the permit should be revised or amended; and

11 2. The permittee shall have the ultimate burden of persuasion that the revision or
12 amendment is not appropriate.

13 (e) Petition to review a decision on an application for a coal exploration permit.

14 1. If the permit applicant is seeking review, he or she shall have the burden of going forward
15 to establish a prima facie case and the ultimate burden of persuasion that the permit application
16 complies with the requirements of KRS Chapter 350 and administrative regulations.

17 2. If a person other than the permit applicant is seeking review, the person shall have the
18 burden of going forward to establish a prima facie case and the ultimate burden of persuasion that
19 the application fails to comply with the requirements of KRS Chapter 350 or the administrative
20 regulations.

21 Section 9. Review of a Cabinet Determination. (1) Who may file. A person who considers
22 himself or herself aggrieved by a determination of the cabinet made under KRS Chapter 350 for
23 which an administrative hearing is not specifically provided in any other section of this

1 administrative regulation may file a petition for review of the determination pursuant to this
2 section.

3 (2) Time to file; waiver.

4 (a) A person filing a petition for review under this section shall file in the office a petition
5 within thirty (30) days after the person has had actual notice of the determination complained of,
6 or could reasonably have had notice.

7 (b) The hearing officer shall not grant an extension of time for filing a petition for review
8 pursuant to this section.

9 (c) If the hearing officer, upon motion or his or her own initiative, finds that the person
10 failed to timely file the petition for review in accordance with this section, the hearing officer shall
11 issue a report recommending dismissal of the petition. The secretary shall enter an order stating
12 that the person waived his right to an administrative hearing.

13 (3) Content of the petition. The petition for review shall contain:

14 (a) A statement of the facts entitling the person to administrative relief;

15 (b) An explanation of each specific alleged error in the cabinet's determination;

16 (c) A copy of the written determination to be reviewed if applicable; and

17 (d) A request for specific relief.

18 (4) Answer or responsive pleading.

19 (a) The respondent shall file with the office an answer or other responsive pleading within
20 thirty (30) days of service of the petition.

21 (b) The answer shall contain:

22 1.a. A statement specifically admitting or denying the facts stated in the petition or
23 amended petition; or

1 b. If the person is without knowledge or information sufficient to form a belief as to the
2 truth of an allegation, then the person shall so state and it shall have the effect of a denial;

3 2. Any defense to each claim for relief; and

4 3. Any other matter to be considered on review.

5 (c) Failure to plead any available administrative affirmative defense in a required answer
6 or responsive pleading may constitute a waiver of that defense, except that lack of jurisdiction over
7 the subject matter and failure to state a claim upon which relief can be granted shall not be waived
8 by failure to assert them in an answer or responsive pleading.

9 (d) An allegation in the petition to which no answer or responsive pleading is required or
10 permitted shall be taken as denied or avoided.

11 (e) An allegation in the petition to which an answer or responsive pleading is required may
12 be deemed admitted if not denied in the answer or responsive pleading.

13 (5) Amended petition.

14 (a) A petition may be amended once as a matter of right prior to the filing of an answer and
15 thereafter by leave of the hearing officer upon proper motion.

16 (b) The respondent shall have ten (10) days from the filing of an amended petition or the
17 time remaining for filing an answer to the original petition, whichever is longer, to file an answer
18 or responsive pleading to the amended petition.

19 (c) If the hearing officer grants a motion to amend a petition, the hearing officer shall set
20 the time for an answer to be filed in the order granting the motion.

21 (6) Effect of filing. The filing of a petition for review shall not stay the effectiveness of the
22 cabinet's determination pending completion of administrative review.

23 (7) Default.

1 (a) If the petitioner fails to timely comply with a prehearing order of a hearing officer, the
2 hearing officer may, at his or her discretion or upon motion, issue an order to show cause why that
3 person should not be deemed to have waived the right to an administrative hearing and why the
4 petition should not be dismissed.

5 (b) If the order to show cause is not satisfied as required, the hearing officer shall
6 recommend to the secretary the entry of a final order finding that the petitioner has waived the
7 right to an administrative hearing and dismissing the petition.

8 (c) If the petitioner fails to appear at an administrative hearing, the petitioner shall be
9 deemed to have waived the right to a hearing and the hearing officer shall recommend to the
10 secretary the entry of a final order finding that he or she has waived the right to an administrative
11 hearing and dismissing the petition.

12 (8) Burden of proof. The petitioner shall have the burden of going forward to establish a
13 prima facie case and the ultimate burden of persuasion as to the requested relief.

14 Section 10. Proceeding for the Suspension or Revocation of a Permit Pursuant to KRS
15 Chapter 350 Because of a Pattern of Violations. (1) Initiation of the proceeding.

16 (a) A proceeding on a show cause order issued by the cabinet pursuant to KRS 350.028(4),
17 350.465(3)(f), and 405 KAR 12:020, Section 8, shall be initiated by the filing of a copy of the
18 show cause order by the cabinet with the office at the same time the order is issued to the permittee.

19 (b) A show cause order shall set forth:

- 20 1. A list of the unwarranted or willful violations that contribute to a pattern of violations;
- 21 2. A copy of each order or notice that contains the violations listed as contributing to a
22 pattern of violations;
- 23 3. The basis for determining the existence of a pattern of violations; and

1 4. A recommendation whether or not the permit should be suspended or revoked, including
2 the length and terms of a suspension.

3 (2) Answer. The permittee shall have thirty (30) days from service of the show cause order
4 within which to file an answer with the office, which shall state:

5 (a) The reasons in detail why a pattern of violations, as established in 405 KAR 12:020,
6 Section 8, does not exist or has not existed including all reasons for contesting:

7 1. The fact of the violations alleged by the cabinet as constituting a pattern of violations;

8 2. The willfulness of the violations; or

9 3. Whether or not the violations were caused by the unwarranted failure of the permittee;

10 (b) Mitigating factors the permittee believes exist in determining the terms of the
11 revocation or the length and terms of the suspension;

12 (c) Other alleged relevant facts; and

13 (d) Whether or not an evidentiary hearing on the show cause order is desired.

14 (3) Burden of proof. In a show cause proceeding, the cabinet shall have the burden of going
15 forward to establish a prima facie case for suspension or revocation of the permit. The ultimate
16 burden of persuasion that the permit should not be suspended or revoked shall rest with the
17 permittee.

18 (4) Determination by the hearing officer.

19 (a) Upon a determination by the hearing officer pursuant to 405 KAR 12:020, Section 8,
20 that a pattern of violations exists or has existed, the hearing officer shall recommend the permit
21 either be suspended or revoked and the permittee be directed to complete necessary remedial
22 measures and reclamation operations. In making the recommendation, the hearing officer need not

1 find that all the violations listed in the show cause order occurred, but only that sufficient violations
2 occurred to establish a pattern.

3 (b) If the permit is suspended, the hearing officer may recommend preconditions to be
4 satisfied prior to the suspension being lifted.

5 (5) Default. If the permittee fails to timely file an answer or appear at the administrative
6 hearing, the permittee shall be deemed to have waived the right to an administrative hearing and
7 the hearing officer shall recommend to the secretary the entry of a final order containing the
8 following:

9 (a) That each violation listed in the show cause order occurred;

10 (b) That the violations were caused by the permittee's unwarranted failure or were willfully
11 caused;

12 (c) That a pattern of violations exists; and

13 (d) That the permit shall be suspended or revoked in accordance with the recommendation
14 contained in the show cause order.

15 Section 11. Temporary Relief. (1) Temporary relief available. Except as established in
16 subsection (2) of this section and pending the completion of the investigation and hearing provided
17 for in this administrative regulation, a hearing officer may, subject to review by the secretary, grant
18 temporary relief from:

19 (a) Notice of noncompliance and order for remedial measures or a cessation order issued
20 pursuant to KRS Chapter 350 or administrative regulations; (b) A permit or bond release decision
21 of the cabinet; or

22 (c) Any action taken by the cabinet pursuant to KRS Chapter 351.

23 (2) Temporary relief not available. A hearing officer shall not grant temporary relief for:

1 (a) The issuance of a permit if the cabinet made a determination to deny a permit in whole
2 or in part; or

3 (b) The release of a bond if the cabinet made a determination to deny a bond release request.

4 (3) A hearing officer shall grant or deny temporary relief from a cessation order issued
5 pursuant to KRS 350.130(1) or (4), or from a bond release decision within five (5) working days
6 of receipt by the office of a temporary relief request, unless waived by the petitioner.

7 (4) Contents of the petition. A person shall file a written petition for relief with the office.
8 The petition shall contain:

9 (a) The permit number, the name of the permittee, the date and number of the notice of
10 noncompliance and order for remedial measures or cessation order from which relief is requested,
11 if applicable, and the name and telephone number of the petitioner;

12 (b) A detailed statement setting forth reasons why relief should be granted;

13 (c) Facts supporting a substantial likelihood that the person requesting the relief will prevail
14 on the merits of the final determination of the proceeding;

15 (d) A statement that the relief sought will not adversely affect the health or safety of the
16 public or cause significant, imminent environmental harm to land, air, or water resources;

17 (e) If the petition relates to a cessation order issued pursuant to KRS 350.130(1) or (4) or
18 a decision to release a bond, a statement of whether or not the person waives the requirement for
19 the hearing officer to grant or deny the request for temporary relief within five (5) working days
20 of receipt of the petition by the office; and

21 (f) A statement of the specific relief requested.

22 (5) Hearing process.

1 (a) In addition to the service requirements of 400 KAR 1:090, Section 5, the petitioner shall
2 serve other parties with a copy of the petition simultaneously with the filing of the petition in the
3 office. If service is accomplished by mail, the petitioner shall inform the other parties by telephone
4 at the time of mailing that a petition is being filed in the office and the contents of the petition.

5 (b) The representative of the cabinet and any other party may indicate their objection to the
6 application by communicating the objection to the hearing officer and the petitioner by telephone.
7 Ex parte communication as to the merits of the proceeding shall not be conducted with the hearing
8 officer. The representative of cabinet and any other party may simultaneously reduce their
9 objections to writing. Written objections shall be immediately filed with the office and
10 immediately served upon the petitioner.

11 (c) Scheduling a hearing.

12 1. Upon receipt of communication that there is an objection to the petition, the hearing
13 officer shall immediately order a location, time, and date for the administrative hearing by
14 communicating the information to the cabinet, any other party, and the petitioner by telephone.

15 2. The hearing officer shall reduce the communication to writing in the form of a
16 memorandum to the file.

17 3. The administrative hearing on the request for temporary relief shall be held in the locality
18 of the permit area, or at any other location acceptable to the cabinet, the petitioner, and any other
19 person named in the action.

20 4. If the petitioner did not waive the requirement for the hearing officer to grant or deny
21 temporary relief within five (5) working days of the office's receipt of the petition for temporary
22 relief as set forth in subsections (3) and (4)(e) of this section, the hearing officer shall schedule the

1 administrative hearing within (5) five days of the office's receipt of the petition for temporary
2 relief.

3 (d) If an evidentiary hearing is held the hearing officer may require the parties to submit
4 proposed findings of fact and conclusions of law to be considered at the evidentiary hearing, which
5 may be orally supplemented on the record at the hearing.

6 (e) If at any time, the petitioner requests a delay or acts in a manner so as to frustrate the
7 expeditious nature of the proceeding or fails to supply the information required by the hearing
8 officer, the action shall constitute a waiver of the five (5) day requirement in subsection (3) of this
9 section.

10 (6) Standard of review. A hearing officer may grant temporary relief if:

11 (a) The person requesting relief shows that there is substantial likelihood that the findings
12 on the merits in an administrative hearing conducted by the cabinet will be favorable to the person;
13 and

14 (b) The relief will not adversely affect the health or safety of the public or cause significant,
15 imminent environmental harm to land, air, or water resources.

16 (7) Timing of hearing officer's determination.

17 (a) A hearing officer shall grant or deny relief expeditiously.

18 (b) If the petitioner did not waive the requirement for a hearing officer to grant or deny the
19 request for temporary relief within five (5) days of the office's receipt of the petition as required
20 in subsections (3) and (4)(e) of this section, the hearing officer shall either:

21 1. Orally rule on the request for temporary relief at the conclusion of the hearing stating
22 the reasons for the decision and issue a written decision stating the reasons for the finding within
23 three (3) working days; or

1 2. Within twenty-four (24) hours of completion of the administrative hearing issue a written
2 decision stating the reasons for the finding.

3 (c) If the petitioner waived the requirement for a hearing officer to grant or deny the request
4 for temporary relief within five (5) days of the office's receipt of the petition in accordance with
5 subsections (3) and (4)(e) of this section, or the petitioner did not request temporary relief from a
6 cessation order or a bond release hearing, then hearing officer shall either:

7 1. Orally rule on the request for temporary relief at the conclusion of the hearing stating
8 the reasons for the decision and issue a written decision stating the reasons for the finding within
9 twenty (20) working days; or

10 2. Within fifteen (15) days of completion of the administrative hearing issue a written
11 decision stating the reasons for the finding.

12 Section 12. Petition for Recovery of Costs and Expenses. (1) Who may file and time to file.

13 (a) A person may file a petition for an award of costs and expenses, including attorneys'
14 fees reasonably incurred, as a result of the person's participation in a proceeding held pursuant to
15 this administrative regulation for an action brought pursuant to KRS Chapter 350 that results in an
16 order of the secretary.

17 (b) A person shall file, with the cabinet within forty-five (45) days of the date of entry of
18 the final order, a petition for an award of costs and expenses, including attorneys' fees.

19 (c) Failure of a person to timely file the petition shall constitute a waiver of the person's
20 right to an award.

21 (2) Content of the petition. A person shall include in the petition filed under this section
22 the name of the party from whom costs and expenses are sought and the following:

1 (a) An affidavit setting forth in detail all costs and expenses including attorneys' fees
2 reasonably incurred for, or in connection with, the person's participation in the proceeding;

3 (b) Receipts or other evidence of the costs and expenses; and

4 (c) If attorneys' fees are claimed, evidence concerning:

5 1. The hours expended on the case;

6 2. The customary commercial rate of payment for the services in the area; and

7 3. The experience, reputation, and ability of the individual or individuals performing the
8 services.

9 (3) Answer.

10 (a) The respondent shall file with the office within thirty (30) days from service of the
11 petition an answer or other responsive pleading.

12 (b) The answer shall contain:

13 1.a. A statement specifically admitting or denying the facts stated in the petition or
14 amended petition; or

15 b. If the person is without knowledge or information sufficient to form a belief as to the
16 truth of an allegation, then the person shall so state and it shall have the effect of a denial;

17 2. Any defense to each claim for relief; and

18 3. Any other matter to be considered on review.

19 (c) Failure to plead any available administrative affirmative defense in a required answer
20 or responsive pleading may constitute a waiver of that defense, except that lack of jurisdiction over
21 the subject matter and failure to state a claim upon which relief can be granted shall not be waived
22 by failure to assert them in a responsive pleading.

1 (d) An allegation in the petition to which no answer or responsive pleading is required or
2 permitted shall be taken as denied or avoided.

3 (e) An allegation in the petition to which an answer or responsive pleading is required may
4 be deemed admitted if not denied in the answer or responsive pleading.

5 (4) Criteria for awarding of costs.

6 (a) Appropriate costs and expenses including attorneys' fees may be awarded to a person
7 from the permittee, if:

8 1. The person initiated an administrative proceeding reviewing an enforcement action, and
9 a Secretary's Order was issued finding that, on or after May 18, 1982:

10 a. A notice of noncompliance and order for remedial measures or a cessation order was
11 properly issued for violations of KRS Chapter 350, KAR Title 405 or a permit condition; or

12 b. An imminent hazard existed; or

13 2. The person participated in an administrative proceeding reviewing an enforcement
14 action, and a Secretary's Order was issued finding that, on or after May 18, 1982:

15 a. A notice of noncompliance and order for remedial measures or a cessation order was
16 properly issued for violations of KRS Chapter 350, KAR Title 405, or a permit condition; or

17 b. An imminent hazard existed; and

18 c. The hearing officer finds and the secretary concurs that the person made a substantial
19 contribution to the full and fair determination of the issues.

20 (b) Appropriate costs and expenses including attorneys' fees may be awarded to a person
21 other than a permittee or his representative from the cabinet, if:

22 1. The person initiated or participated in any proceeding under KRS Chapter 350; and

1 2. The hearing officer finds and the secretary concurs that the person made a substantial
2 contribution to a full and fair determination of the issues.

3 (c) Appropriate costs and expenses including attorneys' fees may be awarded to a permittee
4 from the cabinet if the permittee demonstrates that the cabinet initiated an administrative hearing
5 or issued a notice of noncompliance and order for remedial measures or a cessation order:

6 1. In bad faith; and

7 2. For the purpose of harassing or embarrassing the permittee.

8 (d) Appropriate costs and expenses including attorneys' fees may be awarded to a permittee
9 from a person if the permittee demonstrates that the person initiated an administrative hearing
10 under this administrative regulation or participated in an administrative hearing or conference:

11 1. In bad faith; and

12 2. For the purpose of harassing or embarrassing the permittee.

13 (e) Appropriate costs and expenses including attorneys' fees may be awarded to the cabinet
14 from a person if the cabinet demonstrates that:

15 1. A person applied for review pursuant to this administrative regulation in bad faith and
16 for the purpose of harassing or embarrassing the cabinet or the Commonwealth; or

17 2. A party participated in an administrative hearing or conference in bad faith and for the
18 purpose of harassing or embarrassing the cabinet or the Commonwealth.

19 (5) An award under this section may include reimbursement for costs and expenses,
20 including attorneys' fees and expert witness fees, reasonably incurred.

21 Section 13. Location of an Administrative Hearing. (1) An administrative hearing
22 conducted in accordance with this administrative regulation shall be held at the location designated

1 by the hearing officer unless a written request for a hearing at or close to the mine site is submitted
2 with the initiating document or an answer.

3 (2) The department's regional office for the mine site shall be deemed reasonably close,
4 unless a closer location is requested by a party to the case and agreed to by the hearing officer.

5 (3) An administrative hearing pursuant to KRS Chapter 351.315 to 351.375 shall be held
6 in Frankfort at the location designated by the hearing officer.

7 Section 14. Judicial Review, Effect, and Subsequent Proceeding. (1) Judicial review.
8 Judicial review may be taken from a final order of the secretary to the appropriate circuit court of
9 competent jurisdiction in accordance with KRS 350.032 or 350.0305, as applicable.

10 (2) Effect of final order pending judicial review. The commencement of a proceeding for
11 judicial review of a final order of the secretary shall not operate as a stay of a final order, unless
12 specifically ordered by the court of competent jurisdiction.

13 (3) Remand from a court.

14 (a) If a matter is remanded from a court for a further proceeding, and to the extent the
15 court's directive and time limitations will permit, each party shall be allowed an opportunity to
16 submit to the hearing officer, a report recommending a procedure to be followed in order to comply
17 with the court's order.

18 (b) The hearing officer shall review each report and enter a special order governing the
19 handling of the matter remanded to it for further proceedings by a court.

400 KAR 1:110 approved for filing.
Pages (1-40)

8/13/2019

Date

Charles G. Snavely
Charles G. Snavely, Secretary
Energy and Environment Cabinet

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on October 22, 2019 at 5:00 P.M. (Eastern Time) in Training Room C of the Energy and Environment Cabinet at 300 Sower Blvd, Frankfort, Kentucky. Individuals interested in being heard at this hearing shall notify this agency five workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through October 31, 2019. Send written notification of intent to attend the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Michael Mullins, Regulation Coordinator, 300 Sower Blvd, Frankfort, Kentucky 40601, phone: (502) 782-6720, fax: (502) 564-4245, email: michael.mullins@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Administrative Regulation No.: 400 KAR 1:110

Contact Person: Michael Mullins

Contact number: (502) 782-6720

Email: michael.mullins@ky.gov

- (1) Provide a brief summary of:
 - (a) What this administrative regulation does:

This administrative regulation establishes hearing, conference, notice, penalty assessment, and other procedural and due process provisions for the permanent regulatory program under KRS Chapter 350, and the hearing procedures pursuant to KRS Chapter 351.
 - (b) The necessity of this administrative regulation:

This administrative regulation is necessary to establish administrative hearing practice provisions that relate to the cabinet's administrative hearing process.
 - (c) How this administrative regulation conforms to the content of the authorizing statutes: KRS Chapters 350 and 351 authorize the cabinet to conduct administrative hearings and authorize the cabinet to promulgate administrative regulations to regulate the administrative hearing process. This administrative regulation sets forth hearing, conference, notice, penalty assessment, and other procedural and due process provisions for the surface coal mining permanent regulatory program and the Department for Natural Resources blasting program.
 - (d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation sets forth hearing, conference, notice, penalty assessment, and other procedural and due process provisions for the surface coal mining permanent regulatory program and is authorized by KRS Chapter 350.
- (2) If this is an amendment to an existing administrative regulation, provide a brief summary of:
 - (a) How the amendment will change this existing administrative regulation: The amendment reinforces the Office of Administrative Hearings' existing practice of generally allowing regulated entities to challenge both fact of violation and penalty in a Penalty Assessment Hearing if the fact of violation has not already been adjudicated. The amendment also provides the Office of Administrative hearings the authority to send out notice of assessment conference by standard mail rather than certified mail.
 - (b) The necessity of the amendment to this administrative regulation: This amendment is necessary correct an issue in the administrative regulation that made the provisions in Section 7 less stringent than the corresponding federal regulation. The amendment is also necessary to provide the Office of Administrative hearings the authority to send out notices of assessment conference by standard mail rather than

certified mail.

- (c) How the amendment conforms to the content of the authorizing statutes: The amendment is consistent with 30 C.F.R. § 723.19(a) and in turn conforms KRS 350.028(5) which requires Kentucky administrative regulations to be no more stringent than the Federal regulations promulgated under SMCRA.
 - (d) How the amendment will assist in the effective administration of statutes: The statutes, specifically KRS 350.028(5), require that the KRS 350 administrative regulations closely conform with and shall be no more stringent than SMCRA and the regulations promulgated thereunder. This amendment accomplishes that goal.
- (3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation. This administrative regulation establishes practice provisions that apply to all individuals, businesses, organizations, or state and local governments that either initiate or become subject to an administrative proceeding in the cabinet's Office of Administrative Hearings specifically involving matters brought under KRS Chapter 350 and 351. The number of individuals will be dependent on those entities that fall subject to proceeding in the cabinet's Office of Administrative Hearings.
- (4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:
- (a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: To comply with the amendment the entity will receive notices of assessment conferences by standard mail and will continue to comply with the current hearings procedures as the administrative hearing process will not change.
 - (b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There is no cost to the regulated entity related to these amendments.
 - (c) As a result of compliance, what benefits will accrue to the entities identified in question (3): As a result of compliance, entities will continue to benefit from effective, fair, and timely administrative hearing process.
- (5) Provide an estimate of how much it will cost to implement this administrative regulation:
- (a) Initially: The cabinet will not incur any additional costs for the implementation of this administrative regulation.
 - (b) On a continuing basis: The cabinet will not incur any additional costs for the implementation of this administrative regulation.

- (6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: The cabinet's current operating budget will be used for the implementation of this administrative regulation.
- (7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment. No increase in fees or funding is necessary to implement this amendment.
- (8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees. This administrative regulation does not establish any fees, nor does it directly or indirectly increase any fees.
- (9) TIERING: Is tiering applied? (Explain why tiering was or was not used.)
Yes, tiering was used. Generally, the provisions in this administrative regulation will apply equally to all parties of an administrative adjudication in the Cabinet's Office of Administrative Hearings. However, tiering was used to determine how service will be made to different types of legal entities.

FISCAL NOTE ON STATE AND LOCAL GOVERNMENT

Administrative Regulation No.: 400 KAR 1:110
Contact Person: Michael Mullins

Contact number: (502) 782-6720
Email: michael.mullins@ky.gov

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation?
The cabinet will continue to hold administrative hearings as needed concerning matters covered by KRS Chapters 350 and 351. State and local government will only be impacted insofar as they are parties of an administrative adjudication with the cabinet.
2. Identify each state or federal statute or federal regulation that requires or authorizes action taken by the administrative regulation. KRS 350.020, 350.028, 350.0301, 350.255, 350.465, 350.610, 351.315, 351.345, 351.350, 30 C.F.R. Parts 730, 731, 732, 733, 735, 917, 30 U.S.C. 1253, 1255.
3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the regulation is to be in effect.
 - (a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year?
The proposed administrative regulation will not generate revenue in the first year.
 - (b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years?
The proposed administrative regulation will not generate revenue in subsequent years.
 - (c) How much will it cost to administer this program for the first year?
The cabinet's current operating budget will be used to administer this program for the first year.
 - (d) How much will it cost to administer this program for subsequent years?
The cabinet's operating budget will be used to administer this program for subsequent years.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impacts of the administrative regulation.

Revenues (+/-):	There is no known effect on current revenues.
Expenditures (+/-):	There is no known effect on current expenditures.
Other Explanation:	There is no further explanation.

FEDERAL MANDATE ANALYSIS COMPARISON

Administrative Regulation No.: 400 KAR 1:110

Contact Person: Michael Mullins, Reg. Coordinator

Contact number: (502) 782-6720

Email: Michael.mullins@ky.gov

1. Federal statute or regulation constituting the federal mandate. 43 C.F. R. 733.11
2. State Compliance Standards. KRS 350.028 and KRS 350.060.
3. Minimum or uniform standards contained in the federal mandate. 43 CFR Part 4 Subpart L are federal regulations related to the federal hearings and appeals for surface coal mining.
4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? No. The amendments will return Kentucky's program to equivalency with the federal program.
5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. NA

